

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN LIMBIRD DAVIS,  
Plaintiff,

v.

V. ROY LEFCOURT,  
Defendant.

Case No. [16-cv-04980-JD](#)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

Dkt. No. 6

Plaintiff, a detainee, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

**DISCUSSION**

**STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above

the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face” standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

### LEGAL CLAIMS

Plaintiff alleges that his defense attorney did not properly handling his criminal case. Plaintiff seeks money damages. Defendants in state court prosecutions cannot generally sue their lawyers under Section 1983 for mistakes in their representation. A public defender does not act under color of state law, an essential element of an action under 42 U.S.C. § 1983, when performing a lawyer’s traditional functions, such as entering pleas, making motions, objecting at trial, cross-examining witnesses, and making closing arguments. *Polk County v. Dodson*, 454 U.S. 312, 318–19 (1981). A private attorney representing a defendant or appellant also is not a state actor. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003).

Plaintiff’s allegations against him fall within the scope of work that *Polk County* has determined is not actionable under Section 1983. For this reason, the claim may not proceed. Nor can plaintiff present a state cause of action for malpractice under Section 1983. *See Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001) (“To the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, Section 1983 offers no redress.”) (internal quotation marks and citation omitted). Plaintiff will be provided one opportunity to amend to address the cases cited above.

Plaintiff has also requested the appointment of counsel. The Ninth Circuit has held that a

1 district court may ask counsel to represent an indigent litigant only in “exceptional  
2 circumstances,” the determination of which requires an evaluation of both (1) the likelihood of  
3 success on the merits, and (2) the ability of the plaintiff to articulate his claims pro se in light of  
4 the complexity of the legal issues involved. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir.  
5 1991). Plaintiff appears able to present his claims adequately, and the issues are not complex.  
6 Therefore, the motion to appoint counsel will be denied.

### 7 CONCLUSION

8 1. The complaint is **DISMISSED** with leave to amend. The amended complaint must  
9 be filed within **twenty-eight (28) days** of the date this order is filed and must include the caption  
10 and civil case number used in this order and the words AMENDED COMPLAINT on the first  
11 page. Because an amended complaint completely replaces the original complaint, plaintiff must  
12 include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th  
13 Cir. 1992). He may not incorporate material from the original complaint by reference. Failure to  
14 amend within the designated time will result in the dismissal of this case.

15 2. The motion to appoint counsel (Docket No. 6) is **DENIED**.

16 3. It is the plaintiff’s responsibility to prosecute this case. Plaintiff must keep the  
17 Court informed of any change of address by filing a separate paper with the clerk headed “Notice  
18 of Change of Address,” and must comply with the Court’s orders in a timely fashion. Failure to  
19 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of  
20 Civil Procedure 41(b).

21 **IT IS SO ORDERED.**

22 Dated: November 16, 2016

23  
24  
25   
26 JAMES DONATO  
27 United States District Judge  
28

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JOHN LIMBIRD DAVIS,  
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**CERTIFICATE OF SERVICE**

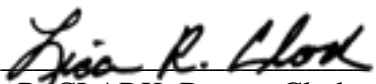
I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 16, 2016, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John Limbird Davis  
#16664426  
850 Bryant Street  
San Francisco, CA 94103

Dated: November 16, 2016

Susan Y. Soong  
Clerk, United States District Court

By:   
LISA R. CLARK, Deputy Clerk to the  
Honorable JAMES DONATO